

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 178

BEN W. FORTSON, JR., AS SECRETARY OF
STATE OF GEORGIA, APPELLANT,

vs.

JAMES W. DORSEY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

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[fol. 4]

[File endorsement omitted]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

Civil Action No. 8756

**JAMES W. DORSEY, DAN I. MACINTYRE, III and
JAMES EDWARD MANGET, Plaintiffs,**

vs.

**BEN W. FORTSON, JR., as Secretary of State of Georgia;
EUGENE GUNBY, Ordinary of Fulton County; and KATH-
ERINE E. MANN, Ordinary of DeKalb County, Defen-
dants.**

COMPLAINT—Filed January 24, 1964

James W. Dorsey, Dan I. MacIntyre, III and James Edward Manget name themselves as plaintiffs herein and show to the Court the following:

1.

The plaintiffs herein name as defendants Ben W. Fortson, Jr., Secretary of State, who is the election official for the State of Georgia; Eugene Gunby, Ordinary of Fulton County and Katherine E. Mann, Ordinary of DeKalb County, each of whom is the election official for the county named and each is responsible for the conduct of elections in his respective county.

2.

This Court has original jurisdiction of this action under the provisions of Section 1343 of Title 28 of the United States Code.

3.

This is a proper case for determination by a bench to be composed of three Judges, as set forth in Section 2281 et seq. of Title 28 of the United States Code, inasmuch as this action seeks to obtain an interlocutory and permanent [fol. 5] injunction to restrain the enforcement, operation and execution of a state statute and a constitutional provision of the State of Georgia, and seeks to restrain officers of the State of Georgia, including the Secretary of State of Georgia, from complying with the provisions of such statutes and constitutional provisions. This action is further brought in the nature of a civil action under Section 2201 and Section 2202 of Title 28 of the United States Code, by seeking relief by declaratory judgment.

4.

James W. Dorsey is a registered voter in the 40th Senatorial District, which is a part of Fulton County, Georgia.

5.

Dan I. MacIntyre, III is a member of the Senate of the State of Georgia, elected from the 40th Senatorial District, which is a part of Fulton County, Georgia, and is also a registered voter in said Senatorial District in Fulton County.

6.

The plaintiff, Dan I. MacIntyre, III, ran and was elected from said 40th Senatorial District of Georgia and intends to run for re-election from said district.

7.

The plaintiff, James Edward Manget, is a registered voter in the 42nd Senatorial District of DeKalb County, Georgia.

8.

On October 3, 1962, the State Legislature of the State of Georgia passed Senate Bill No. 1 of the Second Extraor-

dinary Session of the 1962 Legislature. (Acts, 1962, September-October, Extraordinary Session, Page 7 et seq.) Said Act provides, among other things, for reapportionment of the State Senate and provides for the composition and number of senatorial districts.

[fol. 6]

9.

Two districts each lie within the counties of Muscogee, Richmond, Bibb and Cobb. Three districts each lie within the counties of Chatham and DeKalb. Seven districts lie within Fulton County. All other senatorial districts are composed of one or more counties.

10.

Said Act provides in part in Section 9 that:

"Each senator must be a resident of his own senatorial district and shall be elected by the voters of his own district, except that the senators from those senatorial districts consisting of less than one county shall be elected by all the voters of the county in which such senatorial district is located."

11.

So much of the above quoted paragraph as provides "except that the senators from those senatorial districts consisting of less than one county shall be elected by all the voters of the county in which such senatorial district is located" denies the voters of those districts equal protection of the laws in that it results in invidious discrimination against the citizens and voters of all counties with more than one senatorial district by requiring that their representatives in the senate be elected and voted on by citizens and voters of other senatorial districts, and is therein unconstitutional, invalid, null and void in that it contravenes Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides, in pertinent part:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

4
of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[fol. 7]

12.

In the 1962 general elections, the senators from the senatorial districts lying within the counties of Fulton and DeKalb were elected on a district wide basis and votes were counted on a district wide basis; however, the senators from the districts lying within the counties of Cobb, Bibb, Richmond, Chatham and Muscogee were counted on a county wide basis.

13.

Pursuant to the enactment of the aforesaid Senate Bill No. 1, the Georgia Constitution was amended to read as follows:

"The Senate shall consist of fifty-four (54) members. The General Assembly shall have authority to create, rearrange and change senatorial districts and to provide for the election of senators from each senatorial district, or from several districts embraced within one county, in such manner as the General Assembly may deem advisable." (Article III, Section 2, Paragraph 1, Constitution of the State of Georgia)

14.

The adoption of the amendment to the aforesaid article of the Georgia Constitution also provided for ratification of the statute enacted at the Extraordinary Session of the General Assembly of Georgia, which convened on September 27, 1962 and enacted the statute heretofore referred to as Senate Bill No. 1 of said Extraordinary Session, and said statute was ratified at the 1962 general election.

15.

The plaintiffs show that the essence of a representative government is the selection of the representative by those whom he represents. The representatives elected in the multi-district counties are not under Georgia Law elected by those whom they represent, in that each senator must be elected by the constituents of another senator's district, as well as his own.

[fol. 8]

16.

It is further shown that the electors in the multi-district counties do not have the opportunity of choosing their own individual representative, but must as a group choose a group of representatives.

Wherefore, petitioners respectfully pray that this Court take jurisdiction of this matter; that a special Three Judge Court be convened to hear and determine this matter under the provisions of 28 United States Code, Section 2281 et seq. and that the rights of the petitioners be declared in accordance with Title 28, United States Code, Section 2201 on the following matters:

(1) That this Court hold and decree that so much of Section 9 of Senate Bill No. 1 of the Extraordinary Session of the Georgia Legislature convened in 1962 which says that "... except that the Senators from those senatorial districts consisting of less than one county shall be elected by all the voters of the county in which such senatorial district is located" be declared illegal, void and unconstitutional in that it deprives voters of the aforesaid counties and others similarly situated of liberty and property without due process of law and denies to the plaintiffs and others so similarly situated equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

(2) That this Court hold and decree the aforementioned amendment to the Constitution of the State of Georgia, Article III, Section 2, Paragraph 1, ratified by the electorate of the State of Georgia on the 6th day of November, 1963 and declared by the Governor of the State of Georgia

on the 16th day of November, 1962, to the extent that it [fol. 9] has been construed to authorize said Senate Bill No. 1, or is so applied, unconstitutional since said amendment to the Georgia Constitution is contrary to the Fourteenth Amendment of the Constitution of the United States;

(3) That this Court hold and decree that voters in the aforementioned counties and those similarly situated are entitled to choose senators on the basis of district wide voting rather than on the basis of county wide voting;

(4) That this Court restrain the defendants from furnishing any forms for election of senators based on a method of election on a county wide basis in a multi-district county rather than on a district wide basis in such multi-district county;

Plaintiffs pray for such other and further relief as to this Court seem just, proper and equitable in this cause.

Ed Barham, P. O. Box 587, Valdosta, Georgia;

Charles A. Moye, Jr., C & S National Bank Bldg.,
Atlanta 3, Georgia;

William C. O'Kelley, 1501 Bank of Georgia Bldg.,
Atlanta 3, Georgia;

Edwin F. Hunt, Bank of Georgia Building, Atlanta
3, Georgia.

[fol. 10] *Duly sworn to by James W. Dorsey, Dan I. MacIntyre, III and James E. Manget, jurats omitted in printing.*

[fol. 12] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

ORDER DESIGNATING THREE-JUDGE COURT—February 1, 1964

The Honorable Frank A. Hooper, United States District Judge for the Northern District of Georgia, to whom an application for injunction and other relief has been presented in the above-styled and numbered cause, having notified me that the action is one required by act of Congress to be heard and determined by a district court of three judges, I, Elbert P. Tuttle, Chief Judge of the Fifth Circuit, hereby designate the Honorable Griffin B. Bell, United States Circuit Judge, and the Honorable Lewis R. Morgan, United States District Judge for the Northern District of Georgia, to serve with Judge Hooper as members of, and with him to constitute the said court to hear and determine the action.

Witness my hand this 1st day of February, 1964.

Elbert P. Tuttle, Chief Judge, Fifth Circuit.

[fol. 14] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 15]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

ANSWER AND DEFENSE—Filed February 18, 1964

Now Comes Ben W. Fortson, Jr., as Secretary of State of the State of Georgia, a Defendant in the above styled cause, and files this his Answer and Defense to the Complaint of the Plaintiffs hereinbefore filed, and shows:

First Defense

The Complaint fails to state a claim against this Defendant upon which relief can be granted.

Second Defense

The Complaint fails to join indispensable parties.

Third Defense

This Defendant answers the several Paragraphs of the Complaint as follows:

1.

Answering Paragraph 1 of the Complaint, this Defendant says that his duties as a public official are defined by law, of which this Court can take judicial notice.

2.

This Defendant denies the allegations contained in Paragraphs 2 and 3 of the Complaint.

[fol. 16]

3.

This Defendant admits the allegations contained in Paragraphs 4 and 5 of the Complaint.

4.

This Defendant admits the allegation contained in Paragraph 6 of the Complaint that "The plaintiff, Dan I. MacIntyre, III, ran and was elected from said 40th Senatorial District of Georgia". Further answering such Paragraph 6, this Defendant says that, for want of sufficient information to form a belief, he is unable either to admit or deny the allegation that Plaintiff MacIntyre "intends to run for re-election from said district".

5.

This Defendant admits the allegations contained in Paragraph 7 of the Complaint.

6.

This Defendant admits the allegations contained in Paragraph 8 of the Complaint, except that this Defendant says that Senate Bill No. 1 became law upon the approval of the Governor on October 5, 1962.

7.

This Defendant admits the allegations contained in Paragraphs 9 and 10 of the Complaint.

8.

This Defendant denies the allegations contained in Paragraph 11 of the Complaint.

9.

This Defendant admits the allegations contained in Paragraphs 12, 13 and 14 of the Complaint.

10.

This Defendant admits the allegation contained in Paragraph 15 of the Complaint that "The plaintiffs show that [fol. 17] the essence of a representative government is the selection of the representative by those whom he repre-

sents". This Defendant denies the remaining allegations contained in such Paragraph.

11.

Paragraph 16 of the Complaint states merely a legal conclusion and requires no answer.

12.

Except as herein expressly admitted, this Defendant denies each and every allegation of the Complaint.

Wherefore, this Defendant prays that the prayers of the Complaint be denied and that the Complaint be dismissed.

Eugene Cook, The Attorney General, Paul Rodgers,
Assistant Attorney General, P. O. Address: 132
Judicial Building, 40 Capitol Square, Atlanta,
Georgia, 30303, Jackson 5-0401, Counsel for This
Defendant.

February 18, 1964.

[fol. 18] *Duly sworn to by Ben W. Fortson, Jr., jurat omitted in printing.*

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 39]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

MOTION FOR SUMMARY JUDGMENT OF THE DEFENDANT BEN
W. FORTSON, JR., AS SECRETARY OF STATE OF THE STATE
OF GEORGIA—Filed March 6, 1964

Now Comes Ben W. Fortson, Jr., as Secretary of State of the State of Georgia, a Defendant in the above styled cause, and moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter summary judg-

ment dismissing the action on the ground that the pleadings together with the affidavits attached hereto show that there is no genuine issue between the Plaintiffs and Defendants as to any material fact in this action and that the Defendants are entitled to judgment in their favor as a matter of law.

Wherefore, this Defendant prays that this Motion be sustained and that the Complaint be dismissed.

Eugene Cook, The Attorney General, Paul Rodgers, Assistant Attorney General, P. O. Address: 132 Judicial Building, 40 Capitol Square, Atlanta, Georgia, 30303, Jackson 5-0401, Counsel for This Defendant.

March 6, 1964.

[fol. 40]

EXHIBIT A TO MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
CIVIL ACTION No. 8756

[Title omitted]

AFFIDAVIT SUPPORTING MOTION FOR
SUMMARY JUDGMENT

I, BEN W. FORTSON, JR., being first duly sworn, do depose and say that:

1.

I am a Defendant in the above entitled action.

2.

I am the duly elected and acting Secretary of State of the State of Georgia and have continuously served in such office since February 25, 1946.

3.

I, as Secretary of State, am the official custodian of the election returns for Amendments to the Constitution of the State of Georgia and of the file of Proclamations of the Governor proclaiming the Resolutions as being a part of the Constitution of the State of Georgia.

4.

The three pages of photographed matter hereto attached contain a true and correct copy of the consolidated vote [fol. 41] cast for and against the ratification of the sixteen proposed general Amendments to the Constitution of the State of Georgia in the General Election held on November 6, 1962, and the Proclamation of the Governor, dated November 16, 1962, proclaiming the results of the voting upon the said proposed Constitutional Amendments.

5.

The facts stated by me in this Affidavit are made on my personal knowledge of official records on file in my office which would be admissible in evidence and I am competent to testify as to the authenticity of such records in a judicial proceeding.

/s/ BEN W. FORTSON, JR.
BEN W. FORTSON, JR.

Sworn to and subscribed
before me this 5th day
of March 1964.

/s/ JEAN K. RICHARDS
NOTARY PUBLIC, State of Georgia

Notary Public, Georgia State at Large
My Commission Expires March 3, 1965

(SEAL)

[fol. 42]

ATTACHMENT TO EXHIBIT A

A PROCLAMATION

BY THE GOVERNOR:

WHEREAS: Pursuant to the provisions contained in the proposed Amendments to the Constitution of the State of Georgia, an Executive Proclamation was issued and published as provided in said Acts and as required by the Constitution of this State, submitting the following proposed Amendments for ratification or rejection by the qualified voters of the State at the General Election held Tuesday, November 6, 1962, and the following are the votes received:

	FOR	AGAINST
1. Amendment to the Constitution so as to preserve inviolate freedom from compulsory association at all levels of public education and to require the General Assembly to provide funds for an adequate education for the citizens of Georgia.	123,684	82,250
1A. Amendment to the Constitution so as to provide for the composition of the State Senate, the manner of election of State Senators, the ratification of the apportionment of the Senate and the election of Senators.	119,502	75,598
2. Amendment to the Constitution so as to authorize the General Assembly to provide for the payment of grants to counties under certain conditions.	106,878	84,371
3. Amendment to the Constitution so as to provide for improved appropriations control and to promote economy and efficiency in budget matters.	131,825	59,765

	FOR	AGAINST
4. Amendment to the Constitution so as to create the Department of Industry and Trade and to provide for a Board of Commissioners for said Department.	116,644	75,700
5. Amendment to the Constitution so as to provide that certain compensation of peace officers shall be deemed to be a subsistence allowance.	71,788	125,035
6. Amendment to the Constitution so as to furnish the people's elected representatives in the General Assembly sufficient time to study matters relating to the expenditure of public funds.	129,558	61,982
7. Amendment to the Constitution so as to allow any county or municipality in this State to borrow the necessary funds to defray the cost of property valuation and equalization programs for ad valorem tax purposes.	108,418	82,084
8. Amendment to the Constitution so as to provide for repayment of medical loans and scholarships by service at any prison or detention camp or work camp operated under the jurisdiction of the State Board of Corrections.	118,005	72,502

FOR

AGAINST

[fol. 43]

9.	Amendment to the Constitution of the State of Georgia, authorizing the General Assembly to delegate to counties the right to levy taxes for public transportation, and declaring the same to be an essential governmental function.	86,809	106,294
10.	Amendment to the Constitution so as to disqualify write-in candidates unless they have given notice of candidacy ten (10) days prior to election, and to authorize the General Assembly to enact other regulations.	81,935	113,763
11.	Amendment to the Constitution so as to increase and change the provisions relating to the payment authorized for bringing in the first commercial oil well.	87,777	98,796
12.	Amendment to Article VII, Section VII, Paragraph V of the Constitution of the State of Georgia, as amended, authorizing any county, municipal corporation or political subdivision of the State to issue and sell revenue bonds and to refund any such bonds to provide funds for the purpose of carrying out slum clearance and redevelopment work and to pledge certain taxes for that purpose.	92,124	99,138
13.	Amendment to the Constitution so as to extend the power of taxation over the whole State exercised by the General Assembly to include a tax for school lunch purposes.	93,756	103,813

	FOR	AGAINST
14. Amendment to the Constitution so as to allow counties to undertake and carry out a slum clearance and redevelopment program.	123,923	68,866
15. Amendment to the Constitution so as to provide for the General Assembly enacting legislation over the Governor's veto.	119,084	71,405

THEREFORE: I, S. Ernest Vandiver, Governor of the State of Georgia, do hereby proclaim that general Amendments Nos. 1, 1A, 2, 3, 4, 6, 7, 8, 14, 15, having been ratified according to the Constitution of this State according to the results of the General Election, certified to me by the Secretary of State, are hereby declared to be a part of the Constitution of the State of Georgia, effective this date.

Amendments Nos. 5, 9, 10, 11, 12, 13, not having been ratified are hereby declared not to be a part of the Constitution of Georgia, effective this date.

[fol. 44]

Given under my hand and the Great Seal of the State of Georgia, in the City of Atlanta, this the 16th day of November, 1962, and of the Independence of the United States of America, the One Hundred and Eighty-Seventh.

/s/ S. ERNEST VANDIVER
Governor

BY THE GOVERNOR:

/s/ CHARLES T. WHITE
Secretary,
Executive Department

/s/ BEN W. FORTSON, JR.
Secretary of State

[fol. 45]

EXHIBIT B TO MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION
CIVIL ACTION No. 8756

[Title omitted]

AFFIDAVIT SUPPORTING MOTION FOR
SUMMARY JUDGMENT

I, BEN W. FORTSON, JR., being first duly sworn, do depose and say that:

1.

I am a Defendant in the above entitled action:

2.

I am the duly elected and acting Secretary of State of the State of Georgia and have continuously served in such office since February 25, 1946.

3.

I, as Secretary of State, am the official custodian of the election returns for Amendments to the Constitution of the State of Georgia.

4.

The one-page photographed matter hereto attached contains a true and correct copy of the vote of the electors of each county in the General Election held on November [fol. 46] 6, 1962, for and against the ratification of the proposed Amendment to the Constitution of the State of Georgia so as to provide for the composition of the State Senate, the manner of election of State Senators, the ratification of the apportionment of the Senate and the election of the Senators.

5.

The facts stated by me in this Affidavit are made on my personal knowledge of official records on file in my office which would be admissible in evidence and I am competent to testify as to the authenticity of such records in a judicial proceeding.

/s/ BEN W. FORTSON, JR.
BEN W. FORTSON, JR.

Sworn to and subscribed
before me this 5th day
of March 1964.

/s/ JEAN K. RICHARDS
NOTARY PUBLIC, State of Georgia

Notary Public, Georgia State at Large
My Commission Expires March 3, 1965

(SEAL)

[fol. 47]

ATTACHMENT TO EXHIBIT B

COUNTY	No. 1A		COUNTY	No. 1A	
	FOR	AGAINST		FOR	AGAINST
Appling	178	15	Crisp	409	231
Atkinson	62	6	Dade	99	58
Bacon	56	33	Dawson	70	46
Baker	52	91	Decatur	326	218
Baldwin	601	307	DeKalb	14,292	7,835
Banks	41	75	Dodge	430	593
Barrow	305	192	Dooly	251	170
Bartow	846	661	Dougherty ..	2,057	1,034
Ben Hill	434	149	Douglas	420	257
Berrien	188	114	Early	235	133
Bibb	3,817	4,688	Echols	20	7
Bleckley	309	257	Effingham ..	156	132
Brantley	86	54	Elbert	593	426
Brooks	485	375	Emanuel	390	276
Bryan	75	23	Evans	77	31
Bulloch	355	187	Fannin	123	86
Burke	266	155	Fayette	412	262
Butts	257	81	Floyd	3,421	2,444
Calhoun	169	23	Forsyth	151	97
Camden	427	241	Franklin	459	228
Candler	50	12	Fulton	20,133	14,931
Carroll	748	577	Gilmer	209	756
Catoosa	400	167	Glascocok ..	39	22
Charlton	43	18	Glynn	1,859	650
Chatham	7,302	5,304	Gordon	307	371
Chatta-			Grady	432	276
hoochee	42	37	Greene	375	199
Chattooga	492	208	Gwinnett	1,291	700
Cherokee	589	357	Habersham ..	665	415
Clarke	1,728	1,248	Hall	1,730	1,288
Clay	41	16	Hancock	104	138
Clayton	1,776	820	Haralson	338	162
Clinch	60	40	Harris	244	142
Cobb	5,651	2,646	Hart	195	76
Coffee	473	225	Heard	125	144
Colquitt	692	436	Henry	652	349
Columbia	445	142	Houston	1,929	1,000
Cook	137	119	Irwin	136	110
Coweta	613	256	Jackson	449	232
Crawford	109	92	Jasper	157	113

No. 1A			No. 1A		
COUNTY	FOR	AGAINST	COUNTY	FOR	AGAINST
Jeff Davis ..	87	34	Randolph	97	91
Jefferson	318	195	Richmond	3,201	1,884
Jenkins	193	86	Rockdale	365	212
Johnson	70	81	Schley	90	46
Jones	237	171	Screven	215	216
Lamar	224	184	Seminole	221	43
Lanier	37	3	Spalding	1,094	430
Laurens	471	382	Stephens	511	124
Lee	67	34	Stewart	207	133
Liberty	183	251	Sumter	804	500
Lincoln	106	61	Talbot	141	82
Long	17	9	Taliaferro	49	63
Lowndes	767	236	Tattnall	181	174
Lumpkin	170	91	Taylor	144	122
Macon	249	234	Telfair	408	183
Madison	165	73	Terrell	283	160
Marion	84	36	Thomas	1,853	844
McDuffie	452	186	Tift	497	156
McIntosh	102	90	Toombs	197	162
Meriwether ..	333	166	Towns	65	24
Miller	143	44	Treutlen	114	59
Mitchell	399	149	Troup	859	351
Monroe	535	212	Turner	214	103
Mont-			Twiggs	93	85
gomery	50	109	Union	114	325
Morgan	244	95	Upson	522	223
Murray	188	127	Walker	935	509
Muscogee	3,930	2,232	Walton	447	225
Newton	1,046	510	Ware	1,624	558
Oconee	211	90	Warren	148	65
Oglethorpe ..	136	92	Wash-		
Paulding	216	136	ington	569	295
Peach	371	322	Wayne	502	323
Pickens	153	119	Webster	100	67
Pierce	258	104	Wheeler	171	317
Pike	107	40	White	334	150
Polk	1,001	378	Whitfield	971	581
Pulaski	191	145	Wilcox	182	96
Putnam	315	101	Wilkes	372	242
Quitman	77	47	Wilkinson	148	137
Rabun	191	83	Worth	206	219

TOTALS119,502 75,598

[fol. 48]

EXHIBIT C TO MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

CIVIL ACTION No. 8756

[Title omitted]

AFFIDAVIT SUPPORTING MOTION FOR
SUMMARY JUDGMENT

I, GLENN W. ELLARD, being first duly sworn, do depose
and say that:

1.

I am the duly elected and acting Clerk of the House of
Representatives of the General Assembly of the State of
Georgia and have continuously served in such office since
January 12, 1959.

2.

I, as the Clerk to the House of Representatives, am the
official custodian on this date of all bills and resolutions,
including amendments and substitutes thereto, introduced
in or passed by the House of Representatives during the
1963 and 1964 Regular Sessions of the General Assembly.

3.

An Act of the General Assembly of the State of Georgia,
approved October 5, 1962 (Ga. Laws, Sept.-Oct. 1962,
Extra. Sess., pp. 7-31), provides in part that "the Senators
[fol. 49] from those Senatorial Districts consisting of less
than one county shall be elected by all the voters of the
county in which such Senatorial District is located."

4.

I have made a diligent search of the legislative records on file in the office of the Clerk of the House of Representatives and I fail to find any bill or resolution, including any amendment or substitute thereto, to repeal or otherwise alter the statutory requirement quoted in Paragraph 3 of this Affidavit.

5.

The facts stated by me in this Affidavit are made on my personal knowledge of official records on file in my office which would be admissible in evidence and I am competent to testify as to the authenticity of such records and my search thereof in a judicial proceeding.

/s/ GLENN W. ELLARD
GLENN W. ELLARD

Sworn to and subscribed
before me this 5th day
of March 1964.

/s/ AMELIA SMITH
NOTARY PUBLIC, State of Georgia

My commission expires Oct. 19, 1964.

(SEAL)

[fol. 50]

EXHIBIT D TO MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

CIVIL ACTION No. 8756

[Title omitted]

AFFIDAVIT SUPPORTING MOTION FOR
SUMMARY JUDGMENT

I, ANN DUNCAN, being first duly sworn, do depose and say that:

1.

I am the duly appointed and acting Calendar Clerk of the Senate of the General Assembly of the State of Georgia and have continuously served in such office since January 12, 1948.

2.

I, as the Calendar Clerk of the Senate, am an official custodian on this date of all bills and resolutions, including amendments and substitutes thereto, introduced in or passed by the Senate during the 1963 and 1964 Regular Sessions of the General Assembly.

3.

An Act of the General Assembly of the State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Oct. 1962, Extra. [fol. 51] Sess., pp. 7-31) provides in part that "the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located."

4.

I have made a diligent search of the legislative records on file in the office of the Secretary of the Senate and I fail to find any bill or resolution, including any amendment or substitute thereto, to repeal or otherwise alter the statutory requirement quoted in Paragraph 3 of this Affidavit.

5.

The facts stated by me in this Affidavit are made on my personal knowledge of official records on file in my office which would be admissible in evidence and I am competent to testify as to the authenticity of such records and my search thereof in a judicial proceeding.

Ann Duncan

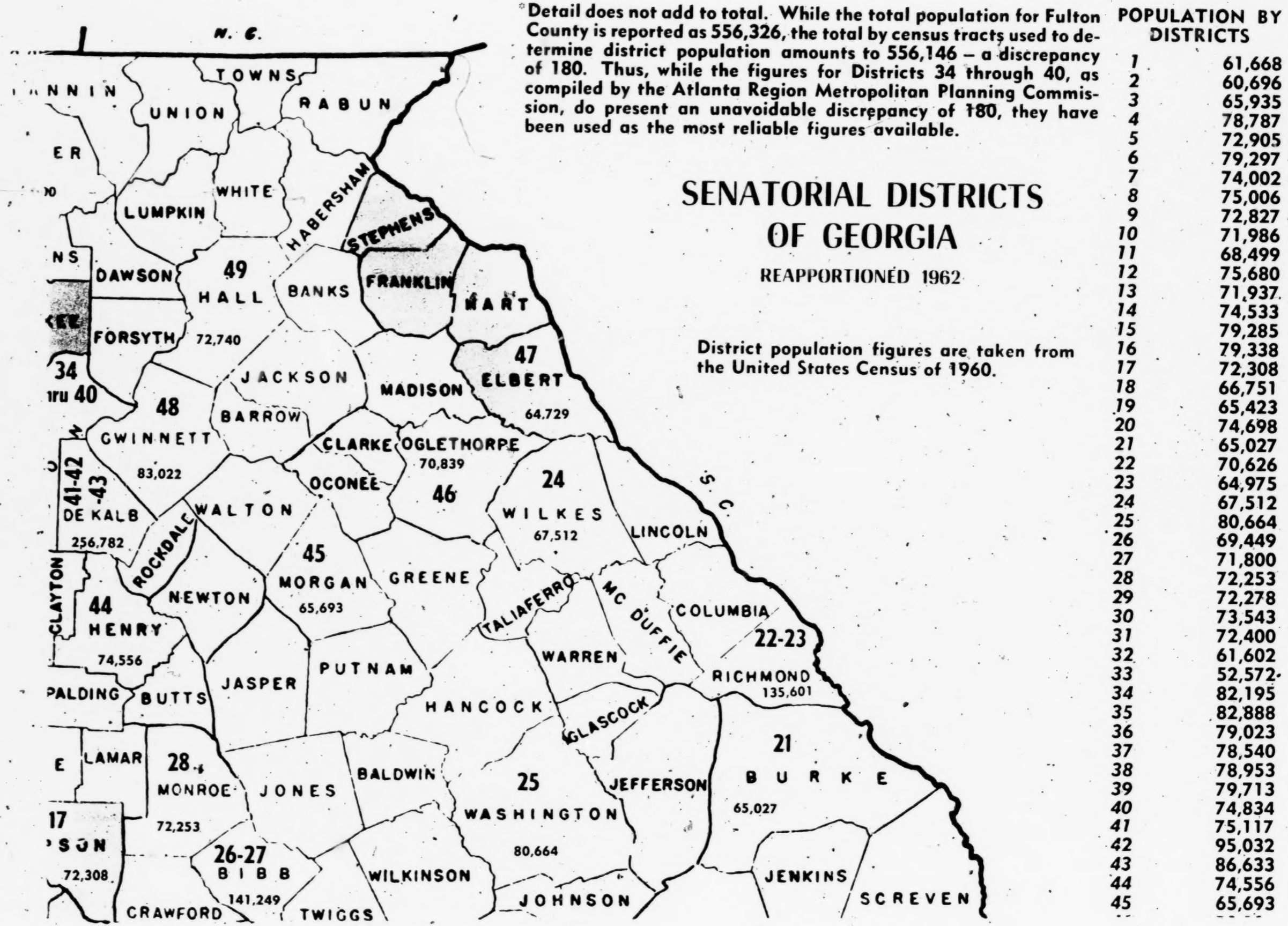
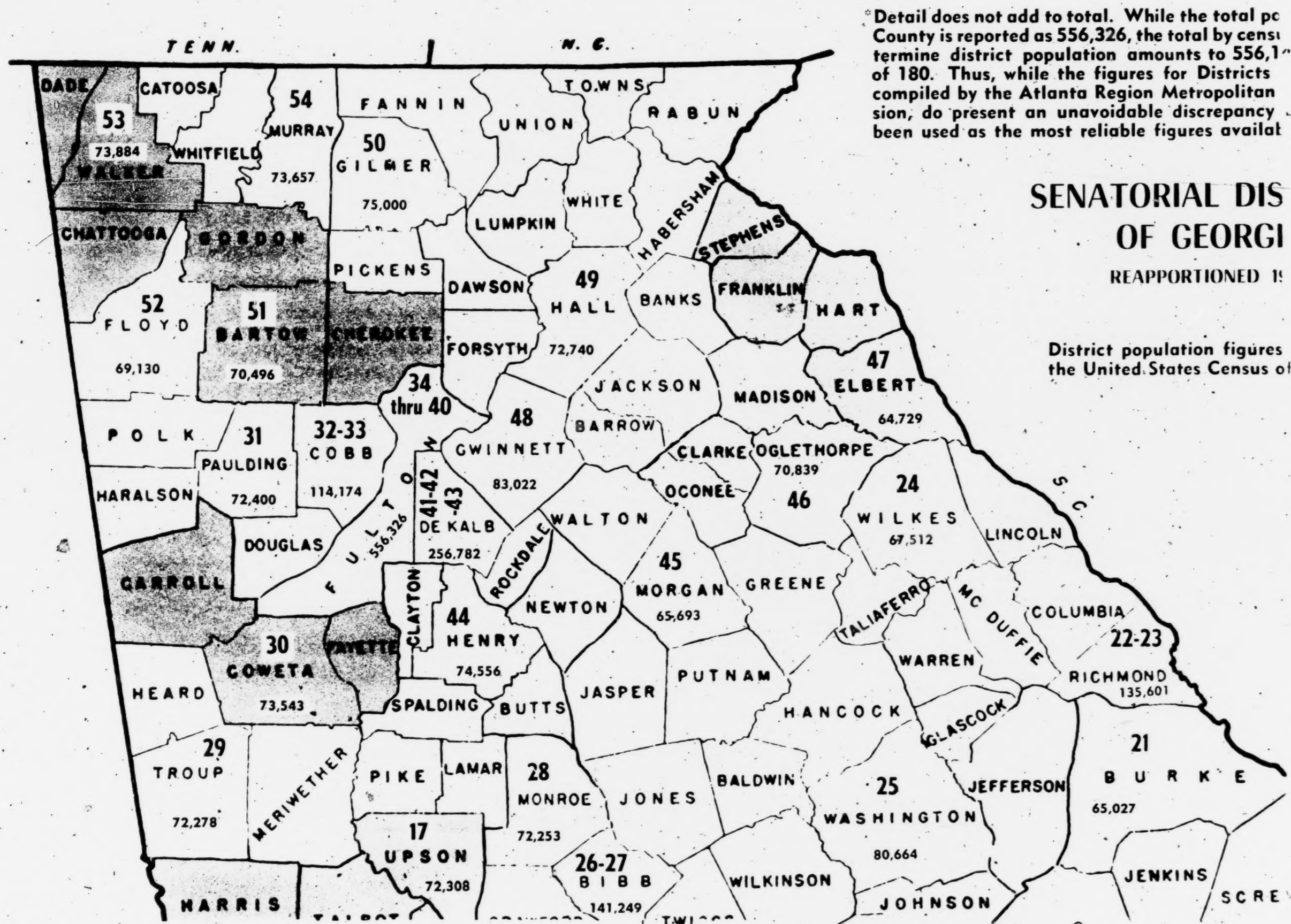
/s/ ANN DUNCAN
ANN DUNCAN

Sworn to and subscribed
before me this 6th day
of March 1964.

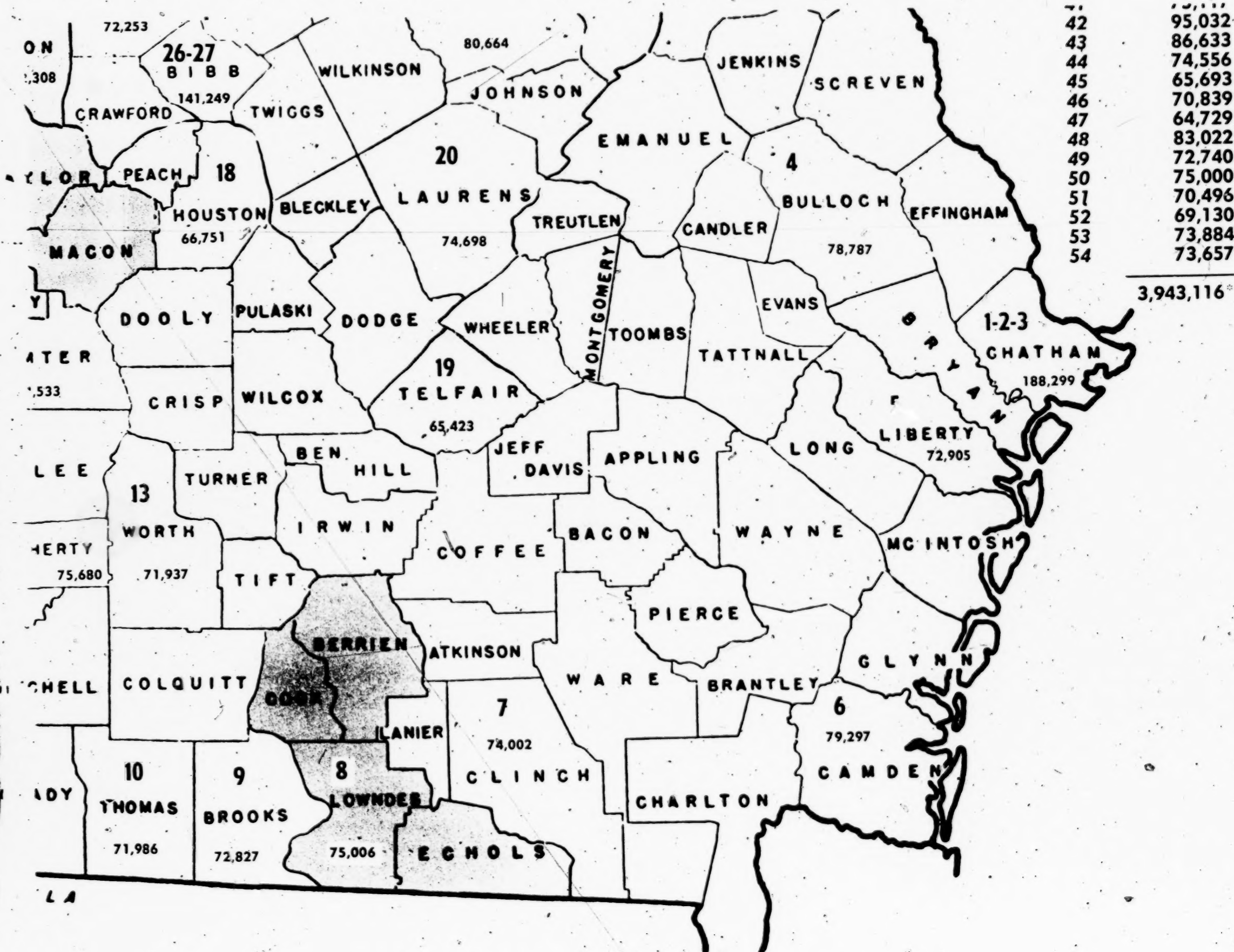
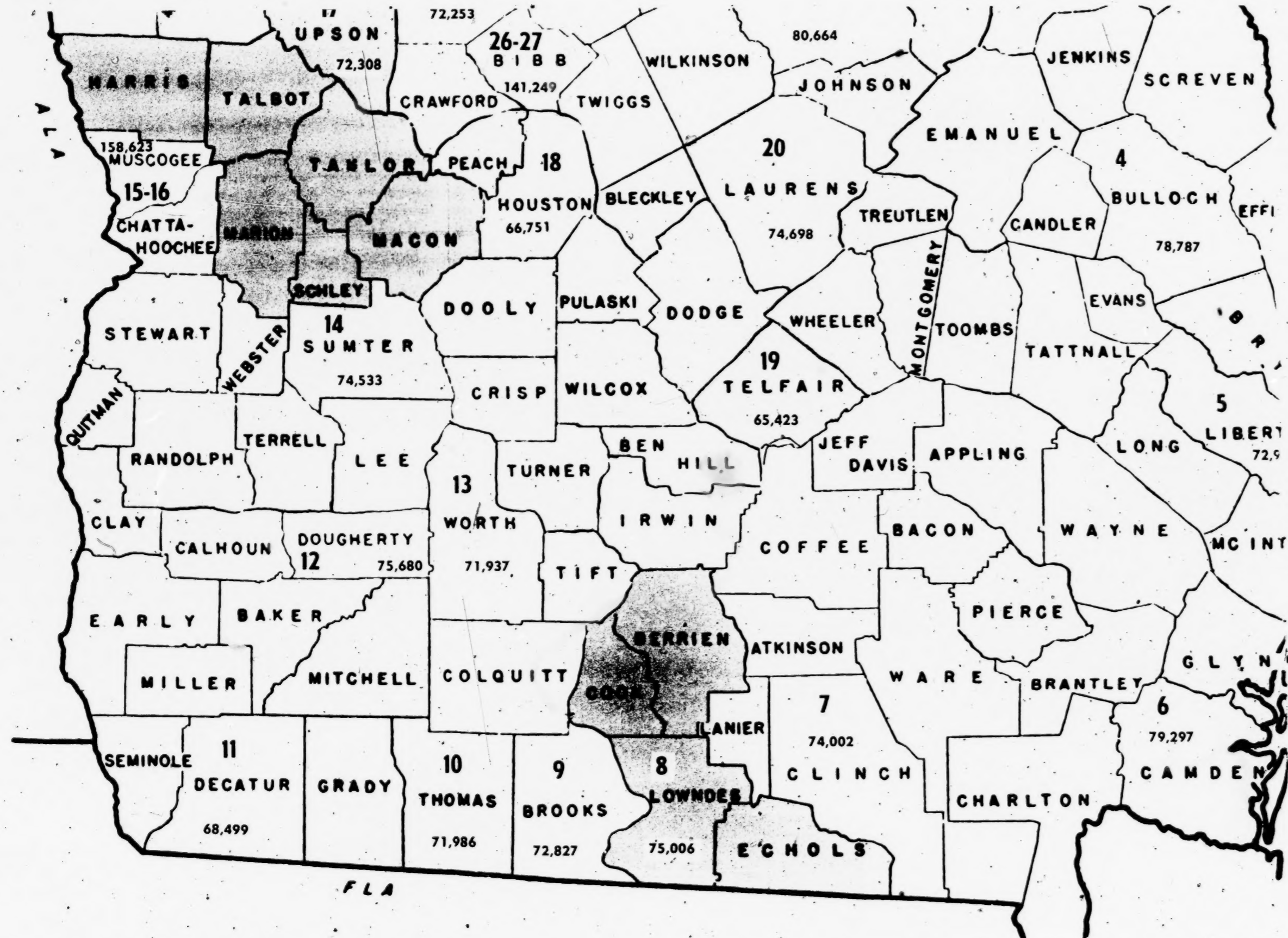
/s/ AMELIA SMITH,
NOTARY PUBLIC, State of Georgia

My commission expires Oct. 19, 1964.

(SEAL)

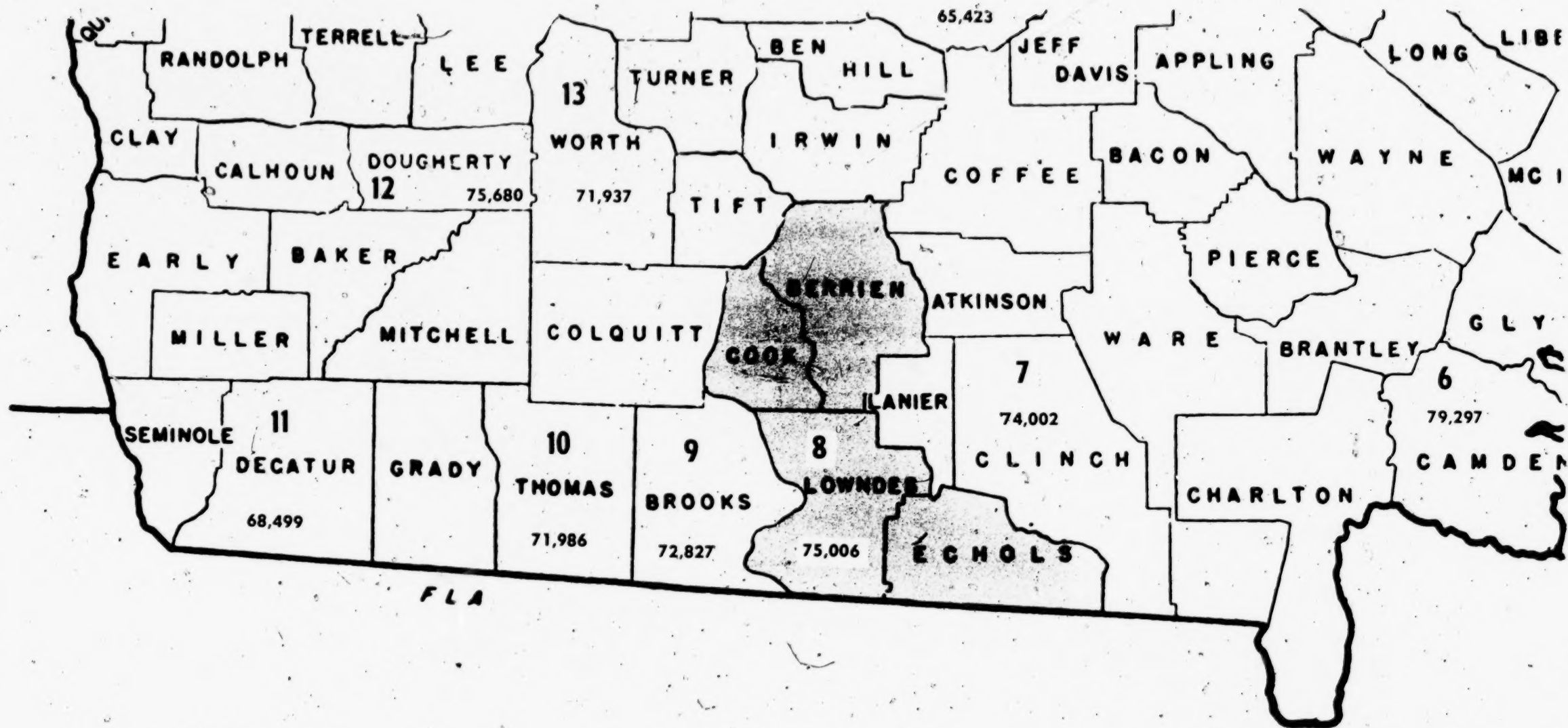


POPULATION BY DISTRICTS	
1	61,668
2	60,696
3	65,935
4	78,787
5	72,905
6	79,297
7	74,002
8	75,006
9	72,827
10	71,986
11	68,499
12	75,680
13	71,937
14	74,533
15	79,285
16	79,338
17	72,308
18	66,751
19	65,423
20	74,698
21	65,027
22	70,626
23	64,975
24	67,512
25	80,664
26	69,449
27	71,800
28	72,253
29	72,278
30	73,543
31	72,400
32	61,602
33	52,572
34	82,195
35	82,888
36	79,023
37	78,540
38	78,953
39	79,713
40	74,834
41	75,117
42	95,032
43	86,633
44	74,556
45	65,693



42	95,032
43	86,633
44	74,556
45	65,693
46	70,839
47	64,729
48	83,022
49	72,740
50	75,000
51	70,496
52	69,130
53	73,884
54	73,657

3,943,116



District	Counties	District	Counties	District	Counties	District	Counties
1-2-3	Chatham	11	Baker, Calhoun, Clay, Decatur, Early, Miller and Seminole	19	Bleckley, Dodge, Pulaski, Telfair, Dooly and Wilcox	28	Butts, Lamar, Monroe, Pike and Spalding
4	Scriven, Effingham, Bulloch, Candler, Evans and Tattnall	12	Dougherty	20	Johnson, Laurens, Treutlen, Wheeler, Montgomery and Toombs	29	Heard, Meriwether and Treutlen
5	Bryan, Liberty, Long, McIntosh and Glynn	13	Ben Hill, Crisp, Irwin, Lee, Turner and Worth	21	Emanuel, Jenkins, Burke and Jefferson	30	Carroll, Coweta and Fayette
6	Jeff Davis, Appling, Bacon, Wayne, Pierce, Brantley, Charlton and Camden	14	Chattahoochee, Randolph, Stewart, Sumter, Terrell, Webster and Quitman	22-23	Richmond	31	Douglas, Haralson, Paulding and Polk
7	Atkinson, Clinch, Coffee, Lanier and Ware	15-16	Muscogee	24	Wilkes, Lincoln, Columbia, McDuffie, Glascock, Warren, Taliaferro and Greene	32-33	Cobb
8	Berrien, Cook, Echols and Lowndes	17	Harris, Macbride, Talbot, Taylor, Schley, Upson	25	Hancock, Baldwin, Washington, Wilkinson and Jones	34 thru 40	Fulton
9	Brooks, Colquitt and Tift	18	Crawford, Twiggs, Houston and Peach	26-27	Bibb	41-42-43	DeKalb
10	Grady, Mitchell and Thomas					44	Clayton, Henry and Rockdale
						45	Putnam, Jasper, Morgan, Newton and Walton
						46	Oconee, Clarke, Madison and Oglethorpe



District	Counties	District	Counties	District	Counties	District	Counties
1	Baker, Calhoun, Clay, Decatur, Early, Miller and Seminole	19	Bleckley, Dodge, Pulaski, Telfair, Dooly and Wilcox	28	Butts, Lamar, Monroe, Pike and Spalding	47	Stephens, Franklin, Hart and Elbert
2	Dougherty	20	Johnson, Laurens, Treutlen, Wheeler, Montgomery and Toombs	29	Heard, Meriwether and Troup	48	Banks, Jackson, Barrow and Gwinnett
3	Ben Hill, Crisp, Irwin, Lee, Turner and Worth	21	Emanuel, Jenkins, Burke and Jefferson	30	Carroll, Coweta and Fayette	49	Dawson, Forsyth, Hall and Lumpkin
4	Chattahoochee, Randolph, Stewart, Sumter, Terrell, Webster and Quitman	22-23	Richmond	31	Douglas, Haralson, Paulding and Polk	50	Fannin, Gilmer, Habersham, Pickens, Rabun, Towns, Union and White
5	Muscogee	24	Wilkes, Lincoln, Columbia, McDuffie, Glascock, Warren, Taliaferro and Greene	32-33	Cobb	51	Bartow, Cherokee and Gordon
6	Harris, Macon, Marion, Schley, Talbot, Taylor and Upson	25	Hancock, Baldwin, Washington, Wilkinson and Jones	34 thru 40	Fulton	52	Floyd
7	Crawford, Twiggs, Houston and Peach	26-27	Bibb	41-42-43	DeKalb	53	Chattooga, Dade and Walker
				44	Clayton, Henry and Rockdale	54	Caloosa, Murry and Whitfield
				45	Putnam, Jasper, Morgan, Newton and Walton		
				46	Oconee, Clarke, Madison and Oglethorpe		

[fol. 88]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
CIVIL ACTION No. 8756

[Title omitted]

MOTION FOR SUMMARY JUDGMENT BY THE PLAINTIFFS—
Filed March 13, 1964

Now comes the plaintiffs in the above styled case, and, through their attorneys, move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter a summary judgment against the defendants on the ground that pleadings, together with the affidavits filed with the Motion for Summary Judgment of the defendant Ben W. Fortson, Jr., show that the plaintiffs are entitled to a judgment in their favor as a matter of law.

Wherefore, the plaintiffs pray that this motion be sustained and that judgment be entered for the plaintiffs against the defendants herein.

William C. O'Kelley, Of Counsel for the Plaintiffs,
1501 Bank of Georgia Building, Atlanta, Georgia
30303, 522-1188.

[fol. 89]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

REFERENCE TO AFFIDAVITS AND BRIEF IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT BY PLAINTIFFS--Filed March
13, 1964

The plaintiffs hereby incorporate in support of its motion for summary judgment all of the affidavits filed with the motion for summary judgment of the defendant, Ben W. Fortson, Jr., and the verified petition. Plaintiffs refer to, without the necessity of repeating herewith, their brief of authorities filed with the Clerk of this Court on March 2, 1964 as an authority for the motion for summary judgment.

The Court asked that the defendant's motion for summary judgment, the plaintiffs' motion for summary judgment and the briefs thereon all be considered at the same time, on March 17, 1964, and that this case be disposed of as involving only questions of law, there being no issues of fact to be decided by the Court.

Respectfully submitted,

William C. O'Kelley, Of Counsel for the Plaintiffs,
1501 Bank of Georgia Building, Atlanta, Georgia
30303, 522-1188.

[fol. 90] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action Number 8756

[Title omitted]

Transcript of Proceedings—Filed April 21, 1964

Atlanta, Georgia; March 17, 1964

Before:

Circuit Judge Griffin Bell, District Judge Frank A. Hooper, and District Judge Lewis R. Morgan.

APPEARANCES:

For the Plaintiffs: Mr. Charles A. Moye, Jr., Mr. William C. O'Kelley.

For the Defendants: Mr. Paul Rodgers, Mr. George P. Dillard, Mr. John T. Ferguson.

[fol. 91] Judge Bell: All right, gentlemen, we will call the case of Dorsey, et al., versus Fortson, et al.

Mr. Moye: Ready for the plaintiffs, Your Honors.

Mr. Rodgers: Ready for the Secretary of State, Your Honors.

Mr. Ferguson: Ready for Eugene Gunby.

Judge Bell: What about Mrs. Mann? Is Mr. Dillard in the courtroom? Any of the counsel heard from Mr. Dillard? Here he is right here.

Let me be sure we have got everybody represented. Mr. Moye, you representing all of the plaintiffs?

Mr. Moye: Together with Mr. O'Kelley and Mr. Hunt, we represent all the plaintiffs.

Judge Bell: All right, sir. Mr. Dillard is representing Mrs. Mann, Ordinary of DeKalb County?

Mr. Dillard: Yes, sir.

Judge Bell: Mr. Rodgers is representing the Secretary of State, Mr. Fortson?

Mr. Rodgers: Yes, sir.

Judge Bell: And Mr. Ferguson is representing Eugene Gunby, the Ordinary of Fulton County?

Mr. Ferguson: Yes, sir.

Judge Bell: All right. Now, I think it would be well to have some agreement about the time you think you need to argue your respective positions. We won't hold you strictly to the time, but we'd like to have an estimate.

[fol. 92] Mr. Moye, we will hear from you.

Mr. Moye: Your Honors, may I raise the question at this time. I assume as plaintiffs we have the burden of showing—we have the burden of going forward and sustaining our case. The Defendant Fortson has filed a motion for summary judgment. I guess generally the movants have the burden of going forward. Two have not.

Judge Bell: Mr. Rodgers can argue that. He is responding to your opening argument.

Mr. Moye: In order to place the case in perspective, we also, although it did not comply with the ten-day rule of the local rules, also filed a motion for summary judgment, because we believe that the matters before the Court can be decided as a matter of law on that basis; I believe that an hour to an hour and fifteen minutes would be sufficient for our side, say, thirty to forty-five minutes in opening and fifteen minutes to a half hour for closing, if that is satisfactory with the Court.

Judge Bell: We will just put it down for an hour and not hold you strictly to it.

Mr. Moye: Very good.

Judge Bell: Who is going to make the first argument for the defendants?

Mr. Ferguson: Your Honors, as far as argument is concerned, I believe we have expressed our position in the [fol. 93] brief; we are willing to abide by the Court's decision, whatever it may be, and we have attempted to call some cases to the Court's attention, but we are leaving it to the Court.

Judge Bell: All right.

Mr. Rodgers: Your Honor, we can keep our arguments within an hour, also.

Judge Bell: All right, sir. Now, the next question, does anybody propose to put anything into evidence like the election returns in the last election?

Mr. Moyer: Your Honors, those are attached as exhibits to the motion for summary judgment of the Secretary of State, and we believe that they should be considered by the Court, and they are incorporated by reference in our motion for summary judgment.

Judge Bell: Now, does that include the county-wide returns as well as the district-wide returns? You remember during the last election, because of some court order, I don't know whose order it was, I have forgotten now, whether it was our order or the Superior Court's order, the election returns were counted on the basis of a county-wide tabulation and a district-wide tabulation. You recall that.

Judge Hooper: Judge Pye's order.

Judge Bell: Is that in evidence?

Mr. Rodgers: No, sir.

Judge Bell: It's not attached to it as an exhibit?

[fol. 94] Mr. Rodgers: No, sir; we did not feel it was necessary to bring in that material in affidavit form.

Judge Bell: I know you wouldn't put it in; I can well understand why you wouldn't put it in, because it is against your position. But I was wondering why the other side didn't put it in.

Mr. Rodgers: Well, since that time, Your Honor, there has been a constitutional amendment to the Georgia Constitution. Of course, those returns could have a bearing, but, of course, exhibits attached to our motion for summary judgment were designed to show the adoption of that constitutional amendment, the counties that it carried in throughout the State, and also two affidavits directly showing there's been no effort made in the General Assembly to change the statutory requirement.

Judge Bell: I know that. Let's don't argue the case right at this point. Mr. Moyer, any way you can put those in so the Court will have the benefit of them, seems to me they go directly to the question of whether this, present system affords representative government. In other words, if they show a candidate from one District, received less

than the majority in the District but won the county-wide race, it would be very pertinent to the issue before the Court, I think.

Mr. Moye: Well, Your Honor, under those circumstances [fol. 95] we would ask leave for ten to fifteen days in order to get those canvasses and make them a part of the record by affidavit. It was going to be our position that the possible discrimination is one as a matter of law and one which the Court can take judicial notice of. However, we would now request that we be given fifteen days following this hearing in which to secure those returns and to put them in as an exhibit to our motion for summary judgment.

Judge Bell: Couldn't you put them in in, say, three days?

Mr. Moye: Certainly make the effort, Your Honor. I don't know the difficulties that are going to attend the securing of them.

Judge Bell: Mr. Rodgers can make them available.

Mr. Rodgers: Your Honor, if it would help the Court, we will try to get the Secretary of State's office, I'm sure they have the information, to prepare this in affidavit form. We will try to get it filed late this afternoon.

Judge Bell: All right.

Mr. Rodgers: Out of an abundance of precaution we would like to offer our affidavits into evidence at this time which are attached to our motion for summary judgment. Also, we will try to get into court either this afternoon or tomorrow the information you have requested.

Judge Bell: All right.

Mr. Rodgers: Do you want that just for Fulton County? [fol. 96] Judge Bell: No; any county.

Mr. Rodgers: In other words, you want it for all seven counties?

Judge Bell: As I recall, Chatham, out of an abundance of caution, counted their votes both ways.

Mr. Rodgers: That's right.

Judge Bell: DeKalb County, I think, counted theirs both ways.

Mr. Rodgers: In some counties the Senators won both ways, so, consequently, it didn't make any difference.

Judge Bell: Well, it would help your side. We want to get some facts before us. The difficulty about a 3-Judge

statutory District Court is you usually don't have sufficient facts to make a ruling on, and it is difficult to have a trial on the facts where you have three judges, but I think in this case it is an important case and warrants having sufficient facts before the Court on which to make an intelligent ruling. If you will do that, Mr. Rodgers, that would be very helpful to the Court.

Mr. Rodgers: All right.

Judge Bell: All right, Mr. Moye, you may proceed.

(Whereupon oral argument was made on behalf of the Plaintiffs by Mr. Moye.)

(Whereupon oral argument was made on behalf of the Defendants by Mr. Rodgers and Mr. Dillard.)

[fol. 97] (Whereupon oral argument was made on behalf of the Plaintiffs by Mr. O'Kelley, during which the following occurred:)

Mr. O'Kelley: I think Your Honor's question inferred, and I certainly agree that this is not necessary, certainly in light of the Wesberry case and in light of the Toombs case, for in the Toombs case the Court said that in Georgia, as in the case of Tennessee, there is no provision in the State Constitution for initiative or referendum instituted by the people to bring about a change in the Constitution and Laws of the State. To argue, as do the defendants here, that the plaintiffs should be limited to the State Legislature to seek the redress which they claim is their constitutional right would be to expect them to succeed in having them in a dominating position in the State Legislature.

Judge Bell: That doesn't follow here at all.

Mr. O'Kelley: We, we submit—

Judge Bell: I have no doubt this statute would be changed in the Legislature if somebody would get over there and make some effort to do it. But the question is, can we go ahead and require, are we under a duty to require it, even though nobody sought it in the Legislature?

Mr. O'Kelley: I think the Court—

Judge Bell: I would have not thought so, and I wrote [fol. 98] an opinion in this Savannah Beach case to the contrary, until Wesberry versus Sanders, but apparently

that hasn't got a thing in the world to do with it now, the fact you can get relief in the Legislature. Apparently Congress could have done this; they have done it for fifty years on re-districting; the Legislature could do it. The Supreme Court didn't allude to that at all, didn't give any weight to that. It just said it was up to the Court to do it.

As I see it, the whole concept of these cases was changed by *Wesberry versus Sanders*. We held in *Toombs versus Fortson* what you just referred to; it was a strangle-hold like you had in Tennessee, you couldn't get relief.

Mr. O'Kelley: Because of the extreme disparity.

Judge Bell: You can get relief here; at least, you can try.

(Whereupon argument continued by counsel for Plaintiffs and Defendants, the following occurring after the close of all arguments:)

Mr. O'Kelley: If we understand the agreement prior to argument, we will submit affidavits as to the county-wide versus district-wide election results to the Court today?

Mr. Rodgers: That's right.

Judge Morgan: That's right.

Judge Bell: And all of you are putting your affidavits into evidence without objection, as I understand?

[fol. 99] Mr. Rodgers: Yes, sir; that's right. It's not in affidavit form but we'd like to put in this map of the State of Georgia which shows the per-district population.

Mr. O'Kelley: We have no objection to the map.

Judge Bell: We'd like to have that.

Mr. O'Kelley: And we consider the verified petition as the affidavit of the plaintiffs.

Judge Bell: You have got somewhere in here the number of people in each senatorial district, haven't you?

Mr. O'Kelley: It's on the map.

Mr. Rodgers: It is on the map itself.

Mr. O'Kelley: It is on the map, and we have no objection.

Mr. Rodgers: In other words, we'd like to offer that map into evidence.

Judge Bell: Well, without taking the time to number all these things, every affidavit—

Mr. Rodgers: That's right.

Judge Bell: —attach it to the pleadings.

Mr. Rodgers: It's every affidavit plus that map attached to the motion for summary judgment. There were four affidavits and that map.

Judge Bell: All right. Now, all yours are attached to the motion for summary judgment?

Mr. O'Kelley: No, sir—yes, sir, Your Honor, our motion for summary judgment referred to the affidavit filed [fol. 100] by the Secretary of State. We accept their affidavits.

Judge Bell: I see; you didn't have any evidence, actually?

Mr. O'Kelley: We have the petition filed by us, which is verified, and we submit the individual verifications in each of the parties and basically all of these facts I think are admitted, even though they were not originally in the answer I think they were ultimately admitted in the briefs.

Judge Bell: All of these things are before the Court now except the canvass of the returns in the last senatorial election which will be furnished this afternoon.

Mr. Rodgers: If we can.

Judge Bell: Now, you may not be able to get all of them.

Mr. Rodgers: That's what I'm saying. You want those clearly for Fulton and DeKalb. The plaintiffs have alleged—

Judge Bell: My question is that the Secretary of State may not have these figures.

Mr. Rodgers: That's right. I'll give you everything the Secretary has on those seven counties.

Judge Bell: All right. And if you can't get them from him, we would like to have them from somewhere else.

Mr. O'Kelley: If we can't get them there I will work with Mr. Rodgers on getting them. I will advise Your Honors by telephone, if I may, and we will endeavor to obtain them from the Secretary of State.

[fol. 101] Judge Morgan: Can't you get them from the Ordinary in Fulton County?

Mr. O'Kelley: This would be my next choice if we can't get them from the Secretary of State.

Judge Bell: Mr. Dillard, you will cooperate?

Mr. Dillard: Yes, sir.

Judge Bell: And Mr. Ferguson?

Mr. Ferguson: Yes, Your Honor.

Judge Bell: You will cooperate to help get them from the Ordinary if you can't get them from the Secretary of State?

Any other matter to come before the Court? Court will stand adjourned under the usual order.

[fol. 102] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 118] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
CIVIL ACTION No. 8756

[Title omitted]

AFFIDAVIT—Filed March 19, 1964

I, Ben W. Fortson, Jr., being first duly sworn, do depose and say that:

1.

I am a Defendant in the above entitled Action.

2.

I am the duly elected and acting Secretary of State of the State of Georgia and have continuously served in such office since February 25, 1946.

3.

I, as Secretary of State, am an official custodian of election returns and other records showing the number of votes cast for candidates seeking the office of State Senator in

the General Election held in the State of Georgia on November 6, 1962, and the Special Election held in Chatham County, Georgia, on February 13, 1963.

4.

Election returns on file in my office show that each person named below was a candidate in the General Election [fol. 119] held on November 6, 1962, for the office of State Senator identified by the Senatorial District indicated, and received in such Election the number of votes stated opposite his name:

Bibb County, Georgia

Twenty-Sixth Senatorial District

William J. Hunt	8,254	(county-wide)
James O. Jackson	4,253	(county-wide)
William J. Hunt	4,074	(dist.-wide)
James O. Jackson	2,741	(dist.-wide)

Twenty-Seventh Senatorial District

J. Taylor Phillips	8,997	(count. -wide)
J. Taylor Phillips	6,748	(dist.-wide)

Chatham County, Georgia

First Senatorial District

Frank O. Downing	15,736
------------------	--------

Second Senatorial District

William A. Searcey	15,822
--------------------	--------

Third Senatorial District

Harris Slotin	11,741
Joseph J. Tribble	11,455

Cobb County, Georgia

Thirty-Second Senatorial District

Edward Kendrick	8,609
-----------------	-------

Thirty-Third Senatorial District

Kyle Yancey	8,609
-------------	-------

DeKalb County, Georgia

Forty-First Senatorial District

H. (Mac) McKinley	
Conway, Jr.	5,546
Earl J. Roberts	3,479

Forty-Second Senatorial District

Ben F. Johnson	9,755
Robert L.	
(Bob) Fine	5,072

Forty-Third Senatorial District

W. Hugh McWhorter	6,017
-------------------	-------

Fulton County, Georgia

Thirty-Fourth Senatorial District

Charlie Brown	8,191
[fol. 120]	
Frank Coggin	4,988

Thirty-Sixth Senatorial District

Joe Salome	4,181
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Thirty-Seventh Senatorial District

George C. Lundquist	2,685
James P. Wesberry, Jr.	6,586

Thirty-Eighth Senatorial District

T. M. Alexander	3,368
LeRoy R. Johnson	7,637

Thirty-Ninth Senatorial District

Oby T. Brewer, Sr.	5,264
Rod Harris	2,662

Fortieth Senatorial District

Hamilton Lokey	8,300
Dan MacIntyre	8,957

Muscogee County, Georgia

Fifteenth Senatorial District

A. Perry Gordy	4,630
William C. (Billy) Wickham	4,608

Sixteenth Senatorial District

Harry Jackson	6,370
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Richmond County, Georgia

Twenty-Second Senatorial District

J. B. Fuqua	8,400
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Twenty-Third Senatorial District

Milford A. Scott	7,785
------------------	-------

5.

Election records on file in my office show that a contest was filed concerning the vote shown in Paragraph 4 above for the candidates seeking the office of State Senator identified with the Third Senatorial District, that such contest resulted in the holding of a Special Election on February 13, 1963, and that in such Election each candidate named [fol. 121] below received the number of votes stated opposite his name:

Joseph J. Tribble	14,127
Eugene H. Gadsden	8,096
Spence M. Grayson	6,628
John H. Baker, Jr.	4,441

6.

The Ordinary for Bibb County, Georgia, is the only election official that filed in my office information showing the number of votes cast for senatorial candidates on a district-wide and county-wide basis in the General Election held on November 6, 1962. A comparison of the votes received by the senatorial candidates running in each of the other six Counties named in Paragraph 4 above with the general

county-wide aggregate vote cast in each of these Counties, respectively, indicates that the senatorial candidates in Chatham, Cobb, Muscogee and Richmond Counties ran county-wide, and that the senatorial candidates in DeKalb and Fulton Counties ran district-wide.

7.

I do not have on file in my office any returns of primaries conducted by political parties for the nomination of party candidates to seek any of the senatorial offices in the seven Counties referred to in Paragraph 4 above in the General Election held on November 6, 1962, or the Special Election held on February 13, 1963.

8.

This Affidavit is submitted pursuant to the direction given by the Court in the above entitled Action on March 17, 1964.

9.

The facts stated by me in this Affidavit are made on my personal knowledge of official records on file in my office which would be admissible in evidence and I am competent to testify as to the authenticity of such records in a judicial proceeding.

[fol. 122]

Ben W. Fortson, Jr.

Sworn to and subscribed before me this 19th day of March 1964.

Jean K. Richards, Notary Public, State of Georgia.

Notary Public, Georgia State at Large. My Commission Expires March 3, 1965.

(Seal)

[fol. 123] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 137]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 8756

JAMES W. DORSEY, DAN I. MACINTYRE, III
and JAMES EDWARD MANGET, Plaintiffs,

v.

BEN W. FORTSON, JR., as Secretary of State of Georgia;
EUGENE GUNBY, Ordinary of Fulton County; and
KATHERINE E. MANN, Ordinary of DeKalb County,
Defendants.

Before BELL, Circuit Judge, and HOOPER and MORGAN,
District Judges.

OPINION—March 27, 1964

PER CURIAM:

Plaintiffs, respectively, a registered voter from the 40th Senatorial District of Georgia, located in Fulton County; the State Senator who is also a registered voter from the same district; and a registered voter from the 42nd Senatorial District of Georgia, located in DeKalb County, seek relief, both declaratory and injunctive, from the force of the Georgia statute which requires countywide voting in the selection of state senators in counties having plural senatorial districts. Ga. Laws, Extraordinary Session, September-October, 1962, p. 7 et seq., § 9. The defendants are the election officials, respectively, for the State of Georgia, Fulton and DeKalb Counties.

The complaint is premised on a claim of violation of rights afforded under the equal protection clause of the [fol. 138] Fourteenth Amendment. This rests on alleged discriminatory treatment of plaintiffs in the debasement of

their right to vote for a senator from their own district in that they must join with voters from other districts in the selection process, while voters residing in counties forming, either in whole or part, single senatorial districts are accorded the right to select their senators on a districtwide basis. They assert, for themselves and those in the same class, that the statutory effect is to place the selection of the senator from any district in a plural district county in the hands of voters other than those residing in the district.

The constitutionality of a state statute being involved in the context of a substantial question, a Three-Judge District Court was convened pursuant to 28 U.S.C.A. § 2281. *Gray v. Sanders*, 1963, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821. At the outset we hold that the court has jurisdiction, plaintiffs have standing to sue, and that a justiciable issue is presented. 28 U.S.C.A. §§ 1343(3), 2201, and 2202; *Baker v. Carr*, 1962, 369 U.S. 186, 82 S.Ct. 601, 7 L.Ed.2d 663; *Gray v. Sanders*, supra; *Wesberry v. Sanders*, United States Supreme Court, No. 22, Oct. Term, 1963, decided Feb. 17, 1964; and *Toombs v. Fortson*, N.D. Ga., 1962, 205 F.Supp. 248.

Plaintiffs as well as defendant Fortson have filed motions for summary judgment and we proceed to a consideration of the merits of those motions. While no findings of fact are necessary in the determination of such motions, *Hindes v. United States*, 5 Cir., 1964, 326 F.2d 150, there is no dispute as to the facts, and they may be briefly stated as follows. We begin with the decision of this court in *Toombs v. Fortson*, supra, holding the General Assembly of Georgia to be malapportioned, and requiring that either the Senate or House of Representatives be apportioned on the basis of population so as to meet minimal constitutional standards of legislative apportionment.

[fol. 139] The General Assembly thereafter convened and reapportioned the Senate on the basis of population. The then existing fifty four senatorial districts were reconstituted with the result that they ranged in population from 52,572 to 95,032. Some districts were located together with others in one county; others were made up of one whole county; while the remainder were comprised of two or